In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1026

AHTANUM IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The first opinion of the court of appeals is reported at 236 F.2d 321 (Pet. App. 25). The second opinion of the court of appeals is reported at 330 F.2d 897 (Pet. App. 190). The opinion denying rehearing is reported at 338 F.2d 307 (Pet. App. 241).

JURISDICTION

The judgment of the court of appeals was entered March 18, 1964, and a timely petition for rehearing

was denied on November 2, 1964. On February 2, 1965, Mr. Justice Douglas extended the time within which petitioners might file a petition for a writ of certiorari to and including April 1, 1965. The petitioner was filed on March 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a 1908 agreement between the United States on behalf of the Yakima Indians and individual white settlers regarding the use of water from Ahtanum Creek was properly construed by the court of appeals as conferring on the white settlers the right to use only so much of the water (up to 75 percent of its natural flow) as they had put to beneficial use in 1908.

STATUTES INVOLVED

5 U.S.C. 485 provides:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * * *
>
> Indians

25 U.S.C. 2 provides:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

STATEMENT

In July 1947, the United States filed this suit against petitioners, a group of white settlers who were using the water of Ahtanum Creek, the northern boundary of the Yakima Indian Reservation, to establish the prior rights of the Indians to the waters of the creek under the doctrine of *Winters* v. *United States*, 207 U.S. 564. The primary defense asserted by petitioners was a 1908 agreement between the United States on behalf of the Yakima Indians and the individual settlers (known as the "Code Agreement"), providing that the settlers could use up to 75 percent of the flow under certain conditions. The district court dismissed the action, but the court of appeals reversed. The court of appeals sustained the validity of the Code Agreement but held that it conferred on the white settlers a right to use only such water as they needed in 1908 and continued to use thereafter, the total not to exceed 75 percent of the natural flow of the stream (Pet. App. 69). The court remanded the case to the district court for a trial and findings of fact.

On remand, the district court, affirming the result of a special master's report, held that petitioners were entitled to 75 percent of the total flow of the creek (not allocated parcel by parcel) and that the Indians were entitled to not more than 25 percent of the total flow. The court of appeals reversed. It held that the agreement was not intended to convey to the white settlers any absolute right to 75 percent of the waters, but that the settlers obtained under the

agreement no more water than they could prove had been put to beneficial use by their predecessors at the time of the agreement and had been used continuously since that time on individual parcels. Since petitioners had failed to show that they had, in 1908, used the creek's waters after July 10, the court awarded to the Indians all the creek's water after July 10 each year. The court of appeals also determined the rights of various parcels to water before July 1 on the basis of undisputed evidence in the record.

ARGUMENT

In two extensive opinions the court of appeals has construed the Code Agreement as granting petitioners rights dependent upon their predecessors' use of the waters of Ahtanum Creek in 1908. This construction does not conflict with any decision of this Court or of any other court of appeals, and it fairly resolves the dispute between petitioners and the Yakima Indians in light of the probable intentions of the parties to the agreement and the language they used in comprising their dispute. Accordingly, there is no reason for further review by this Court.

1. The Code Agreement did not, by its terms, convey any rights to the use of water or otherwise divide up ownership in the creek's flow. The agreement provided only that the United States, on behalf of the Indian tribes, would "limit and define its claim" to 25 percent of the natural flow, and that petitioners' predecessors in interest would likewise "limit and

define [their] total and aggregate claim" to 75 percent of such flow (Pet. App. 18). The court of appeals in its second opinion construed the agreement as applying only to that portion of the year when, in 1908, the creek's waters were actually used by petitioners or their predecessors. It found, on uncontradicted evidence, that the water was used only until the early part of July of each year; consequently, it directed that the judgment in this case award to the Indians all the creek's waters after July 10 (Pet. App. 213-219).

This construction accorded with the probable intentions of the parties to the agreement and with the language they used. Ahtanum Creek's waters were used by the settlers in 1908 only prior to July 10 of each year. Under these circumstances it is highly unlikely that the parties intended the agreement to control the use of water after July 10. Moreover, by casting the agreement in terms of a limitation upon claims rather than as an outright conveyance or allocation of priorities, the parties to the agreement demonstrated that they were considering the assertion of rights then available rather than any subsequent use upon which claims might be made in the future.

2. There is no merit to petitioner's contention that the court of appeals misconstrued the words "natural flow" as used in the agreement (Pet. 19-20). The court of appeals did not base its decision on any limiting interpretation of those words, nor did it in any manner suggest that "natural flow" ceased as of July 10 each year. Rather, the court of appeals con-

strued the agreement as generally inapplicable to uses of the creek at times which could not have been contemplated by the parties. This construction did not require that any unusual meaning be ascribed to the words "natural flow."

3. Nor did the court of appeals improperly reject, as petitioners contend (Pet. 24-26), any findings of fact made by the special master or the district court. The findings to which petitioners refer (Pet. 25) related to "diversion *requirements*" and not actual *use* of the water. The court of appeals observed that the master, on remand, had mistakenly considered petitioners' current need, rather than their predecessors' 1908 use, as dispositive. The finding quoted by petitioners rested upon that mistaken premise. Moreover, the court of appeals did not rest its conclusion on a finding that the creek did not flow after July 10 but on the fact that petitioners or their predecessors made no use of the "diminished" supply available after that date (Pet. App. 210).

4. Whether or not the court of appeals misapplied Washington law in determining the rights of the parties (see Pet. 28-34) obviously presents no question warranting review by this Court. In any event, we submit that the court of appeals properly applied the principle of State law which recognizes that a water right "may be measured by time as well as by volume" (Pet. App. 214). The actual use of the waters of Ahtanum Creek in 1908 did not encompass any diversion of its flow during the dry season of the year by the white settlers. Hence they could not be said to have appropriated the creek's waters for their

own use during those months. Thus, the court of appeals correctly decided that the rights reserved to the Indians by treaty as to that period were not affected by the Code Agreement.

5. Finally, petitioners' assertion that the agricultural community on the north side of Ahtanum Creek will be ruined by the decision of the court of appeals (Pet. 20-24) does not warrant further review of this case. The claim has no merit even assuming that there is some factual basis for the assertion—a premise which we do not concede. Had petitioners prevailed in the court of appeals, the same arguments could have been made by the Indian tribes; inherent in any lawsuit over a limited supply of water is the possibility that the losing party's agricultural enterprises may suffer. Petitioners do not contend that the Indian tribes or the United States actively misrepresented the meaning of the agreement to them or to their predecessors in interest. Whatever land they cultivated on the north side of Ahtanum Creek, therefore, was cultivated on the risk, of which they were well aware, that if their construction of the agreement was judicially rejected the water needed for irrigation might become unavailable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.*

Respectfully submitted,

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MAY 1965

* We have filed a conditional cross-petition for a writ of certiorari, *United States* v. *Ahtanum Irrigation District, et al.*, No. 1035, this Term, which, we submit, should be granted if the present petition is granted.

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